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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL GONZALES PENA,

Defendant and Appellant.

2d Crim. No. B266438
(Super. Ct. No. 2010028681)
(Ventura County)

Miguel Gonzales Pena appeals judgment after conviction by court trial of a felony murder committed in 2008 and a robbery committed in 2010. (Pen. Code, §§ 187, subd. (a), 189, 211.)¹ The trial court found true the special circumstance that Pena committed the murder while engaged in the commission of a robbery (§ 190.2, subd. (a)(17)(A)) and found true firearm allegations as to both counts. (§ 12022.53, subds. (b) & (d).) It sentenced Pena to life without the possibility of parole

¹ All statutory references are to the Penal Code unless otherwise stated.

plus 25 years to life in prison for murder with discharge of a firearm. (§§ 190.2, subd. (a)(17)(A), 12022.53, subd. (d).) It sentenced him to a consecutive 15-year prison term for robbery with use of a firearm. (§§ 211, 12022.53, subd. (b).)

Pena contends the trial court erred when it admitted a recorded conversation between his accomplices, his recorded conversation with the murder victim's widow, and his police interviews. He also contends a mandatory minimum sentence of life without the possibility of parole for an "arguably" unintentional killing during a robbery violates due process. We affirm.

BACKGROUND

In 2008, Pena robbed and killed Uriel Bucio. He planned the robbery with Gerardo Mariscal. Mariscal gave Pena a gun and told him Bucio would be leaving an auto dealership the next evening with a large amount of cash. Pena covered his face with a bandana. He took \$5,000 from Bucio and then shot him in front of Bucio's 10-year-old son. Bucio's murder remained unsolved for almost two years.

In 2010, Pena committed another robbery. Pena, Mariscal, Alberto Castro, Ambrosio Gomez, and Edgar Canchola robbed a group of people who were gathered at a barbeque to raise money to donate to a town in Oaxaca. Pena and Mariscal "threw" the group onto the ground and threatened them with guns while Canchola took two suitcases he thought would contain half a million dollars. Castro drove the getaway car, which belonged to Pena. The suitcases contained only paper.

Castro and Canchola later extorted \$15,000 cash from the president of the fundraising group. Police traced an

extortion call to Castro. Castro admitted his involvement in the robbery and agreed to cooperate with police.

Castro wore a recording device during conversations with each of his accomplices before they knew they were suspects. During those conversations, Pena and Mariscal spoke of the 2010 robbery and the 2008 murder.

Pena told Castro that during the 2010 robbery he used a small gun to “cover” Canchola. He told the fundraisers, “everybody down to the ground.” He told “one . . . with a small boy,” to “go down, old asshole.”

Pena told Castro he had no criminal history but had done other “jobs,” that “came about.” As an example, he described Bucio’s 2008 murder. Pena said he and Mariscal expected Bucio to have a large amount of cash, but “he didn’t have as much money as we thought.” Mariscal gave Pena the job because Bucio and his son would recognize Mariscal. Pena shot Bucio after he robbed him because Bucio said, “I know who you are.” Pena told Castro, “I didn’t have any choice . . . [¶] . . . I hit the dude.” I thought, “fuck! if they come to my house.” Pena said, “that dude never was, was armed, nothing.” Pena said, “I took everything from him, I came out like with no remorse.” He said Mariscal provided the gun and sold it afterward.

Mariscal also described the 2008 murder to Castro. He said Pena took money from a man and killed him in front of the man’s son. Mariscal said he “gave the job to [Pena],” because “the dude knew me . . . [and] his little boy knew me really well.” Mariscal said Pena wore gloves and a piece of cloth over his face. After the murder, Mariscal “passed” the gun to a “dude . . . from . . . Colonia.”

Police arrested Pena, Mariscal, Canchola and others. When the court appointed counsel at Pena's arraignment, only the 2010 robbery was charged.

In the week after arraignment, police interviewed Pena twice about the 2008 murder. They advised him of his *Miranda*² rights. They told him they could not discuss the 2010 robbery case in which he was represented.

In both interviews, Pena said he understood his rights. He answered the officers' questions. In the first interview, he denied any involvement in the murder. In the second, he admitted that he robbed and shot Bucio but he said he did not intend to shoot him. Pena said the gun "went off by itself" because he was afraid and shaking. He pled with the officers to let him go home to his family.

Toward the end of the second interview, Pena asked the officers to tell the district attorney and his own attorney that he did not "do anything" in the 2010 robbery. The officers reminded him not to discuss the robbery case with them and agreed to pass the information along.

Pena asked the officers to arrange for him to speak with Bucio's widow so he could apologize and ask her to support his release from jail. She visited the jail. They spoke through a glass partition using a visitor's telephone. The call was recorded. Pena said, "I know it was not right, I know that I destroyed your life . . . and your son's life," but "it was an accident," and "I don't want to stay in jail."

The People amended the robbery complaint to allege that Pena and Mariscal murdered Bucio in 2008. Pena waived his right to jury. Castro, Canchola, and Gomez pled guilty to the

² *Miranda v. Arizona* (1966) 384 U.S. 436, 467 (*Miranda*).

2010 robbery. Mariscal was tried separately from Pena and refused to testify at Pena's trial.

The court admitted redacted portions of Mariscal's recorded conversation with Castro over Pena's objection that it was inadmissible, self-serving, unreliable hearsay. The court found that the redacted portions were against Mariscal's penal interest and reliable. (*People v. Duarte* (2000) 24 Cal.4th 603 (*Duarte*); Evid. Code, § 1230.)

The court also admitted Pena's police interviews and his conversation with Bucio's widow over Pena's objection that they were "obtained by deceit and surprise," "given in a forced, non-voluntary manner," and violated his "Constitutional rights to counsel, self-incrimination and a fair trial." The court found that Pena knowingly waived his *Miranda* rights and freely answered the officers' questions. It found that Pena requested the meeting with the widow who was not acting as a police agent.

The court found Pena guilty of murder and robbery and found the special circumstance and firearm allegations to be true. It found that Pena "intentionally shot the victim," because "he believed that Mr. Bucio knew who he was" and that "the murder was independent of the robbery."

DISCUSSION

Accomplice Statements

Pena contends the trial court violated his constitutional rights and hearsay laws when it admitted Mariscal's redacted statements to Castro about the murder because the statements were testimonial and self-serving. (U.S. Const., 5th, 6th & 14th Amends.; *Crawford v. Washington* (2004) 541 U.S. 36, 54 (*Crawford*); *Pointer v. Texas* (1965) 380 U.S. 400, 404-405; Evid. Code, § 1230.) We disagree.

The confrontation clause is concerned solely with hearsay statements that are testimonial. (*People v. Cage* (2007) 40 Cal.4th 965, 981.) A statement is testimonial only if it is made primarily for the purpose of establishing facts for possible use in a criminal trial. (*Id.* at p. 984.) A “statement[] made unwittingly to a Government informant” is “clearly nontestimonial.” (*Davis v. Washington* (2006) 547 U.S. 813, 825; accord, *People v. Arauz* (2012) 210 Cal.App.4th 1394 (*Arauz*).) *Crawford* does not apply because Mariscal’s statements were nontestimonial: They were not made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. (*Crawford, supra*, 541 U.S. at p. 52.) When Mariscal bragged to Castro about the murder, he “had no idea that he was talking to someone who was working for the police,” as the trial court found. “The last thing [he] expected was for his statement to be repeated in court.” (*Arauz, supra*, at p. 1402.)

Mariscal’s statements were admissible under state law because they were against his penal interest. A statement is within California’s penal interest exception to the hearsay rule if (1) the declarant is unavailable, (2) the statement was against his or her penal interest when made, and (3) the statement is reliable. (Evid. Code, § 1230; *Duarte, supra*, 24 Cal.4th at pp. 610-611.) Mariscal became unavailable when he refused to testify. (U.S. Const., 5th Amend.; Evid. Code, § 240, subd. (a)(1).) His statements were specifically disserving of his penal interest and inherently reliable.

Because declarations against penal interest may contain self-serving hearsay, only statements that are “specifically disserving to the interests of the declarant,” fall

within the exception. (*Duarte, supra*, 24 Cal.4th at pp. 610, 612; *People v. Lawley* (2002) 27 Cal.4th 102, 153 (*Lawley*).) For example, an accomplice's hearsay statement that shifts or spreads blame to the defendant is inherently untrustworthy and must be subjected to cross-examination or excluded. (*Duarte, supra*, at p. 609; *Lilly v. Virginia* (1999) 527 U.S. 116, 132 (*Lilly*).) "[T]he least reliable circumstance is one in which the declarant has been arrested and attempts to improve his situation with the police by deflecting criminal responsibility onto others." (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 335 (*Greenberger*).)

The trial court brought these rules to the attention of counsel and reviewed Mariscal's interview with them, line-by-line. It excised each part that deflected blame to Pena or was not specifically dis-serving of Mariscal's penal interests. For example, it redacted Mariscal's statements, "I told him don't bump him," "I told him don't hurt him," and his assertion that Pena said, "I shot him."

The court admitted only the dis-serving statements. Mariscal took full responsibility for directing Pena to rob Bucio at gunpoint, supplying the gun, ordering the "job," and disposing of the gun afterward. Mariscal said, "I mean, I, I, I set the deal up for him." Although Mariscal said he was not present for the killing, he admitted he was acting in concert with Pena (*People v. Cervantes* (2004) 118 Cal.App.4th 162, 175 (*Cervantes*)): When Castro asked, "But you waited for him, you waited outside for him, right?" Mariscal answered, "Yes." And when Castro said, "[Y]ou are, you are also part of all that, then," Mariscal answered, "Yes, of course." It is within this inculpatory context that Mariscal said he was not present for the robbery and that Pena "fucked somebody up," and wore gloves. "Whether a statement is

self-inculpatory or not can only be determined by viewing the statement in context.” (*Lawley, supra*, 27 Cal.4th at p. 153.) The court did not abuse its discretion when it determined that each statement it admitted was specifically dis-serving.

Mariscal’s statements to Castro were inherently reliable under any standard of review. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1251 [review for abuse of discretion whether declaration against penal interest is trustworthy]; but see *Cervantes, supra*, 118 Cal.App.4th at pp. 174-175 [de novo review].) To determine whether a declaration against penal interest is sufficiently trustworthy, the court “‘may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant’s relationship to the defendant.’ [Citation.]” (*People v. Cudjo* (1993) 6 Cal.4th 585, 607.) As the trial court found, Mariscal’s statements were “made to . . . a partner in crime,” “under circumstances where there’s no reason for them to be fabricated.” Mariscal spoke to his friend in what he believed to be a confidential setting with no understanding that he was a target of suspicion. These circumstances are unlike those in *Duarte, supra*, 24 Cal.4th 603, 616 and *Lilly, supra*, 527 U.S. 116, 139, in which accomplices spoke in the “coercive atmosphere” of a police interrogation, and “‘tr[ie]d to fasten guilt’ on others” while “‘keeping [their] own skirts as clean as possible.’” (*Duarte, supra*, at pp. 616-617, citations omitted.) They are more like the circumstances in *Cervantes*, in which the declarant spoke to a neighbor who was tending his wounds, and *Tran* in which the declarant spoke to a friend on their way to burn evidence. (*People v. Tran* (2013) 215 Cal.App.4th 1207, 1213, 1220.) “[T]he most reliable circumstance is one in which the conversation

occurs between friends in a noncoercive setting that fosters uninhibited disclosures.” (*Greenberger, supra*, 58 Cal.App.4th at p. 335.)

Pena’s Police Interviews

In both police interviews, the officers apprised Pena of their intention to use his statements against him, his right to remain silent, and his right to counsel. (*Miranda, supra*, 384 U.S. at p. 467.) After independently reviewing the record, we conclude Pena understood, waived, and did not later invoke his rights. (*People v. Waidla* (2000) 22 Cal.4th 690, 730 [independent review]; *Edwards v. Arizona* (1981) 451 U.S. 477, 482-483 [only a knowing and intelligent waiver is valid].) In both interviews, he told the officers he understood his rights before he proceeded to answer questions. As the trial court found, he “freely talked to them,” “never asked for a lawyer,” and “never told them he didn’t want to talk.” His uncoerced decision to talk after he was apprised of his rights was a knowing and intelligent waiver. (*People v. Cunningham* (2015) 61 Cal.4th 609, 642.)

Pena contends he demonstrated confusion about his rights and implicitly invoked his right to counsel at the end of his second interview when he tried to discuss the 2010 robbery and asked the officers to convey information to his attorney about it. His claim is forfeited because he did not raise it in the trial court. (*People v. Gurule* (2002) 28 Cal.4th 557, 602-603.)

In any event, when Pena asked the officers to convey information, he had already admitted he robbed and shot Bucio. He then tried to tell the officers about the 2010 robbery. An officer reminded him they could not discuss it and he should talk to his lawyer about it. (“I’m not here to discuss the robbery”; “[t]hat’s something that you need to discuss with your attorney.”)

Pena said he could not afford an attorney. The officer reminded him one was appointed free of charge. (An “attorney would be appointed for you free of charge, remember?”) Pena said there are “times when I can’t talk to [the public defender].” He asked the officers to “pass to them some information” that he “didn’t do anything.” The officers agreed they would.

The exchange did not reflect any confusion about Pena’s right to consult with counsel or remain silent about the 2008 murder. And when “a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, . . . precedents do not require the cessation of questioning.” (*Davis v. United States* (1994) 512 U.S. 452, 459, italics omitted.)

Conversation with Bucio’s Widow

Pena contends the court should have excluded his conversation with Bucio’s widow pursuant to *Miranda* because she acted as an agent of the police, it was a custodial interrogation, and he was not advised that he had the right to an attorney or that the statements could be used against him.

Pena asked to speak to Bucio’s widow and voluntarily spoke to her when she visited him in jail. The call began with a recorded admonishment, “This call may be recorded or monitored.” Substantial evidence supports the trial court’s determination that the widow was not “an agent of the police.” And even if she were, “[c]onversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*.” (*Illinois v. Perkins* (1990) 496 U.S. 292, 296.)

Pena cites the *Massiah* rule, which bans police from using an undercover agent to circumvent the Sixth Amendment

once a suspect has been charged. (*Massiah v. United States* (1964) 377 U.S. 201, 206.) But the rule does not apply because Pena had not been charged with the 2008 murder when he spoke to the widow. (*People v. Tate* (2010) 49 Cal.4th 635, 685, fn. 26.) He had been charged with the 2010 robbery, but the *Massiah* rule is offense-specific; it does not apply to his statements about crimes that are unrelated to the crime with which he had been charged. (*People v. Webb* (1993) 6 Cal.4th 494, 527.)

Sentencing

Pena's sentence is life without the possibility of parole because he committed murder while committing robbery. (§ 190.2, subd. (a)(17)(A).) He contends the sentencing statute is unconstitutionally vague because it does not distinguish between an unintentional felony murder and an intentional killing that is committed to facilitate a robbery. But Pena intentionally killed Bucio. And the felony-murder special-circumstance statute is not unconstitutionally vague because it applies only if the defendant's intent to commit the felony is independent of his intent to kill, as it was here. (*People v. Riccardi* (2012) 54 Cal.4th 758, 836, overruled on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; *People v. Andreasen* (2013) 214 Cal.App.4th 70, 81; CALCRIM No. 730.) Pena's intent to rob Bucio was independent of his intent to kill, as the trial court found. Pena robbed Bucio because Bucio was carrying cash. Pena shot Bucio because Bucio said, "I know who you are." Pena, "came out like with no remorse." His sentence is not unconstitutional.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Charles W. Campbell, Jr., Judge

Superior Court County of Ventura

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